

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. — Original.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD
C. JOHNSON, BANK COMMISSIONER, *Plaintiff*.

v.

R. M. COOK, *Defendant*.

PLAINTIFF'S REPLY TO ANSWER TO RULE TO SHOW CAUSE

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Commissioner, Plaintiff.*

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JURISDICTION.

The State of Oklahoma has asked leave to file this original action against a citizen of another State, under Article III, Section 2, Clause 1 of the Constitution and, Section 233 of the Judicial Code. (U. S. C. A. Title 28, Section 341.)

QUESTION PRESENTED.

The question raised is whether the State of Oklahoma is a real party in interest or only a nominal party.

Defendant admits that the State of Oklahoma is a *necessary* party plaintiff but contends that as she is not the beneficial owner of the claim, she has no standing to proceed. (Answer to Rule, page 9.)

ARGUMENT.

The Provisions of the State Law.

The Statute of Oklahoma under which the right arises also charges the State exclusively with its enforcement. It must be enforced by the State on the relation of the Bank Commissioner. The creditors of the failed bank cannot sue to enforce the claim. It is enforceable by the State alone:

- Section 9173, Oklahoma Statutes 1931 (page 10, plaintiff's complaint)
- State ex rel Mothershead v. Kelly*, 141 Okla. 36, 284 Pac. 65;
- State v. Quigley*, 93 Okla. 296, 220 Pac. 918;

Shareholders liability in Oklahoma constitutes, in effect, a reserve or trust fund, to be resorted to only in proceedings in liquidation, and the benefits go to all creditors collectively, not separately.

State ex rel Mothershead v. Kelly, supra.

In *State ex rel Murray v. Pure Oil Co.*, 169 Okla. 507, 37 Pac. (2d) 608, the Supreme Court of Oklahoma defined the nature of the State's interest in the liquidation of insolvent banks as follows:

"The protection of depositors of insolvent state bank is a distinct economic policy of the State. *State ex rel Short, Atty. Gen. v. Johnson et al*, 90 Okla. 21, 215 Pac. 945. This policy was promulgated by constitutional provision (section 1, Art. 14, Okla. State Const.) as vitalized by legislative enactments (Article 4 (Section 9147 et seq.) and Article 6 (Section 9168 et seq.) of Chapter 40, O. S. 1931. In so far as the object of this action is to further the established economic policy of the State, the State may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank."

In liquidating an insolvent bank, the State is acting in its sovereign capacity. Thus, the Oklahoma Supreme Court has held repeatedly that the statute of Limitations does not run against the enforcement of the obligations of an insolvent bank in the hands of the State, as the statute does not run against the State:

Richison v. State ex rel Barnett, 176 Okla. 537, 56 Pac. (2d) 840;

State ex rel Shull v. McLaughlin, 159 Okla. 4, 12 Pac. (2d) 1106;

State ex rel Freeling v. Ware, 82 Okla. 130, 198 Pac. 859.

The state is the legal owner of the claim sued on.

Section 9179, Oklahoma Statutes, 1931, which provides in part as follows:

“ * * *. The State of Oklahoma, on the relation of the Bank Commissioner, shall be deemed to be the owner of all the assets of failed banks in his hands, for the use and benefit of the depositors and creditors of said bank, and no deposit for costs shall be required in any court of the State of Oklahoma in which the State of Oklahoma, on the relation of the Bank Commissioner, is a party, and no costs shall be taxed against the State of Oklahoma, and paid by the State of Oklahoma, on the relation of the Bank Commissioner, in any such suits, and it shall be the duty of all the courts of the State of Oklahoma, and all the officers of the State or County, to give preference to all matters pending in such courts in which the State of Oklahoma, on the relation of the State Bank Commissioner, is a party.”

This court held in *Lankford v. Platte Iron Works Company*, 235 U. S. 461, that an action against the members of the State Banking Board of Oklahoma, charged with administering its Bank Depositors' Guaranty Fund, was an action against the State and could not be maintained in the Federal courts under the 11th Amendment without the consent of the State. The Oklahoma Supreme Court has held that the repeal of the Guaranty Fund Act did not

change the State's relation to the liquidation of insolvent State banks. *Richison v. State ex rel. Barnett, supra.*

In the enforcing of the claim in suit, the State is discharging a duty expressly imposed upon it by statute. Section 9174 Oklahoma Statutes 1931 provides in part:

“ * * * The Commissioner *shall collect* all debts due and claims belonging to it and, upon the order of the District Court of the County in which it is doing business may sell or compound all bad or doubtful debts and, on like order, may sell all its real and personal property on such terms and at public or private sale, as the Court shall direct and *shall enforce* the liabilities of stockholders of such bank. (Italics added.) The stockholders' liability of such bank shall become due and payable upon the date of the taking possession of the property of any such bank by the Bank Commissioner, and the order of the Bank Commissioner finding the bank to be insolvent shall be conclusive evidence of that fact and the liability of said stockholders shall bear interest at the rate of six (6%) per cent per annum, from the date of the taking possession of the property of such bank by the Bank Commissioner.”

We consider that the foregoing Oklahoma Statutes and decisions establish the following points:

- (1) The State has the *legal title* to the claim in suit and is a *necessary party plaintiff*;
- (2) An action to enforce the claim could not be instituted by any other plaintiff; and
- (3) In enforcing collection of stockholders' liability claims, the State is performing its *express legal duty* as statutory receiver or trustee for the creditors of the failed bank.

The Construction of Article III, Section 2 of the Constitution.

The test for determining whether Federal jurisdiction exists under Article III, Section 2 of the Constitution is the same in cases where a State is a party plaintiff as in cases where the United States is a party. In both classes of cases, the question is whether the State or United States is a mere *nominal party* or has a real interest in the controversy. On this premise, we believe that jurisdiction in this case is squarely established under the principles laid down by this Court in

United States v. Minnesota, 270 U. S. 181;

United States Fidelity & Guaranty Company v. United States suing for the benefit of Kenyon, 204 U. S. 349.

United States v. Minnesota, presented the question of whether the Court had jurisdiction of an original bill by the United States to obtain lands to which it was alleged the Chippewa Indians were entitled and which Minnesota claimed under illegal patents. The court conceded that "if the Indians are the real parties in interest and the United States only a nominal party" original jurisdiction did not exist. The bill showed that the Indians were under the guardianship of the United States, that the patents were issued without authority and in violation of an existing obligation of the United States to apply the lands and the proceeds of their sale exclusively to the use and benefit of the Indians. The prayer declared that the lands and moneys recovered would be held, administered and disposed of for the benefit of the Indians. The Court assumed jurisdiction, stating:

" * * * the United States has a real and direct interest in the matter presented for examination and adjudication. Its interest arises out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the

fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign."

*** "Neither does the fact that they (*i. e. the Indians*) could not sue the state show that the United States is without right to sue her for their benefit. *But it does make for and emphasize the duty, and therefore the right, of the United States to sue.*" (Italics added.)

In *United States Fidelity & Guaranty Company v. United States, suing for the benefit of Kenyon, supra*, was an action on a bond furnished under an Act of Congress to protect persons furnishing labor or materials to any contractor constructing public works for the United States. The action was brought against the contractor's surety by the United States "suing herein for the benefit and in behalf of James S. Kenyon" for the value of materials furnished by Kenyon to the contractor for use in the construction of a government building. The statute prescribing the bond, authorized any person protected "to bring suit in the name of the United States for his or their use and benefit." Jurisdiction depended on whether the United States was the real party litigant.

In upholding the jurisdiction of the Circuit Court, this Court stated:

"*** Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection. It may well have thought that the government was under some obligation to guard the interests of those whose labor and materials would go into a public building. *** There is, therefore, a controversy here between the United States and the contractor in respect of that matter."

"The action is none the less by the government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment."

The defendant herein relies on the cases of *New Hampshire v. Louisiana*, 108 U. S. 76, *North Dakota v. Minnesota*,

263 U. S. 365, and *Louisiana v. Texas*, 176 U. S. 1, as supporting its point that jurisdiction does not exist. These cases all involved original bills by states against other states and therefore turned upon the question of immunity of the defending states from suit in the Federal courts under the 11th Amendment. The question in the first two of these cases was not the right of the plaintiff state to sue but the right of the defending state to be immune from suit unless the party beneficially interested was another state. The inquiry in each instance was to determine whether the plaintiff state was lending its sovereign name to one or more private persons as a cloak of legal subterfuge to bring to the bar another sovereign who otherwise would be immune from suit, except in its own courts, as it might gratuitously permit. There is sound reason for scrutinizing the nature of the complaining states' claim in such cases, for it involves the very delicate question of sovereign immunity. But these cases are inapplicable to the case at bar where the state in pursuance of a well established policy, common to more than half of the states of the Union, by express statutory provision assumes the duty of liquidating failed banks for the benefit of the creditors involved.

Thus, in *North Dakota v. Minnesota* this Court said:

"The jurisdiction and procedure of this court in controversies between states of the Union differ from those which it pursues in suits between private parties" ***.

"The right of a state as *parens patriae* to bring suit to protect the general comfort, health or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee *against a sister State*".
(Italics added.)

In *New Hampshire v. Louisiana*, the Court said:

"We are satisfied that we are *prohibited*, both by the letter and the spirit of the Constitution, (i.e. the 11th

Amendment) from entertaining these suits.” (Italics added.)

In *Louisiana v. Texas*, the Court raised but did not decide the question of its jurisdiction *as against the State of Texas*, that the injury complained of was to a group of citizens of Louisiana, residents of New Orleans, rather than the State itself. The case against Texas failed because the bill did not show “that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own.” The opinion dealt separately with the case against the individual defendant, the Texas health officer, holding that no case was made against him, as the remedy for any acts of official maladministration rested with the Texas authorities “and no refusal to fulfill their duty in that regard is set up.” The necessary conclusion is that the fact that Louisiana was acting for a group of its citizens did not bar jurisdiction as against the individual defendant, a citizen of another State.

Cases dealing with suits between states have no bearing on the controversy in this case. Where a state as the representative of individuals sues a sister state, the nature of the interest of the former in the controversy is inquired into only because upon this hinges the right of the defending state to immunity. While a state as a representative of private individuals may not sue a sister state in Federal courts, *non constat* that jurisdiction does not lie in a similar action against an individual defendant who does not enjoy such immunity, provided the suing state has sufficient interest in the subject matter to enable it to state a cause of action. Obviously the suing state must be something more than a pure volunteer. It must have an interest in the subject matter as *parens patriae*; as in the case of *Georgia v. Tennessee Copper Company*, 206 U. S. 230, or a property right of a legal or equitable nature, as in the cases of *United States v. Minnesota*, 270 U. S. 181 and *South Dakota v. North Carolina*, 192 U. S. 286, which it is

entitled to call upon the courts to preserve or enforce, as otherwise no cause of action would be stated. Where a state has a property right fixed by *express statutory provision* other than a subterfuge for circumventing the 11th Amendment as was the case in *New Hampshire v. Louisiana*, 107 U. S. 76, we do not see how it can logically be contended that the state may not invoke the jurisdiction of the Federal courts to enforce its claims against an individual defendant, who is a citizen of a sister state, although private individuals may subsequently receive the principal benefits of the recovery. In the case at bar, the state's interest is direct and immediate, whereas the interest of the depositors is wholly indirect and dependent upon a distribution of the fund in the hands of the Bank Commissioner after the payment of all administration expenses, taxes and other prior claims. The state is vested with the legal title to the claim and is under the express duty of enforcing it.

Oklahoma v. Atchison T. & S. F. R. Co., 220 U. S. 277, cited by defendant, presents a case where the state had no legal or equitable interest affected and its citizens in whose behalf it sued, could themselves have obtained relief in their own names had any cause of action existed. However, the discussion of the nature of the state's interest is not only dictum but hypothetical as well, and the decision rests on the fact the provisions in the act of Congress relied upon had ceased to be operative when Oklahoma became a state and was no longer a territory.

Original jurisdiction depends upon the character of the parties. It does not depend on the nature of the cause of action, as defendant contends. "The character of the parties is everything, the nature of the case nothing." *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257. Nor as defendant states, is it limited to cases for redress of the sovereign rights of states, such as boundary disputes, water rights and the like. "Jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their

inhabitants and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible for the Court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this Court". *Missouri v. Illinois*, 180 U. S. 208, 241.

The Court has jurisdiction of an original action by a state to "enforce a property right."

South Dakota v. North Carolina, 192 U. S. 286.

Nor will it be necessary, as defendant apprehends, to convert this Court into a *nisi prius* court for a jury trial of the issues involved. This is a matter of academic concern, for there are no controvertible issues of fact in the case, the determination of the Bank Commissioner being conclusive of all essential matters.

Section 9174 Oklahoma Statutes 1931.

Thompson v. State ex rel Bank Commissioner, 119 Okla. 166, 248 Pac. 1110;

State ex rel Mothershead v. Kelly, 141 Okla. 36, 284 Pac. 65;

Broderick, Supt. of Banks v. Rosner, 294 U. S. 629.

That it is not the purpose of the State of Oklahoma generally to enforce by original action in this Court claims of this character, is evidenced by the fact that it has endeavored first to obtain relief elsewhere. It has come to this Court at this time because at the defendant's insistence the United States District Court ruled, we believe properly, that the State of Oklahoma was the real party in interest and hence that jurisdiction did not lie in that court and because, as set forth on page 2 of plaintiff's motion for leave to file complaint, the Missouri state court required a degree of proof with respect to the insolvency of the bank and

the necessity for the enforcement of shareholder's liability which was virtually impossible of production, and refused to attach any probative effect to the Commissioner's determination of these matters, notwithstanding the authorities quoted above.

Because this is an action in which the state has a direct present property interest and a statutory duty to perform we believe that this Court unquestionably has jurisdiction. We find no case in which jurisdiction has been denied under these circumstances.

CONCLUSION.

The State of Oklahoma submits that its motion for leave to file the complaint should be granted.

Respectfully submitted,

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